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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

NO. 28.

SUPERIOR OIL COMPANY, Appellant,

VS.

STATE OF MISSISSIPPI, EX REL

RUSH H. KNOX, ATTORNEY GENERAL.

PETITION FOR REHEARING.

WM. H. WATKINS,
W. LEE GUICE,
Attorneys for Appellant.

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In The Supreme Court of The United States

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NO. 28.

SUPERIOR OIL COMPANY, Appellant,

VS.

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RUSH H. KNOX, ATTORNEY GENERAL.

PETITION FOR REHEARING.

This Honorable Court affirmed the judgment of the Supreme Court of Mississippi upon the theory that while the facts in this case may have constituted interstate commerce, under the authority of *Louisville & Nashville R. R. Co. v. Parker*, 242 U. S. 13-14, and *Kalem Co. v. Harper Brothers*, 222 U. S. 55, 62, the results of the transactions not being fixed and definite, that the interest of the State in the right to tax would rise superior to the possibility that the transaction was in interstate commerce, especially in

view of the fact that the transportation was in the vessels of the purchaser, and not by means of a common carrier.

We have carefully considered the cases cited above and the record in the case including the opinion rendered by Your Honors, as well as the Supreme Court of Mississippi; and as under the facts admitted by the Court, in our opinion the decision overrules a number of well considered and established cases, including *Hughes Bros. v. Minnesota*, 272 U. S. 469, and *Champlain Realty Co. v. Brattleboro*, 260 U. S. 366, we feel that we may with respect ask the Court to consider whether or not this be a case in which it will be proper to grant a rehearing to the appellant, especially in view of the fact that the record will disclose that proceeding on the theory that the shipments were in interstate commerce, no tax was collected by the appellant, R. page 39, and, therefore, if a doubt exists in the mind of the Court, such doubt should be resolved in favor of the taxpayer, as well as the fact of the well determined rules governing the question of interstate commerce prior to this decision, as firmly established in the Hughes Bros. and Champlain Realty Company cases.

We would, therefore, with the utmost respect suggest to the Court that under its finding the cause would have .been reversed had the transportation been by common carrier, and that the opinion makes this test a deciding factor, which though we think the Court may reconsider in view of the two following propositions that we shall urge upon the Court as the reasons for a rehearing, viz:

First: The record including the finding of fact by Your

Honors shows that appellant was following a well established course of business in making the sales of gasoline charged against it, and without interruption carried or transported this gasoline across the borders of the State of Mississippi.

Second: That whether or not the gasoline was transported in the purchaser's vessels is not decisive of the nature of the commerce, but the possibility of diversion of the goods always yields to the party's intent and the transportation actually accomplished, which propositions we shall now try to briefly demonstrate.

FIRST

The record including the finding of fact by Your Honors shows that appellant was following a well established course of business in making the sales of gasoline charged against it, and without interruption carried or transported this gasoline across the borders of the State of Mississippi.

We shall first quote from the facts as found by Your Honors:

"The facts are as follows. The Superior Oil Company, a corporation created and doing business in Mississippi, sold gasoline to packers in Biloxi in that state and delivered it at the packers' wharves. The latter loaded the oil upon their own fishing boats and sent it out to the neighborhood of Grant's Pass, Louisiana, where they delivered it to shrimp fishermen for use in fishing."

The only testimony in the record as to the nature of Grant's Pass shows that it was a station where all boats fishing in Louisiana were required to secure permits or Licenses; R. Page 39, and although the purchaser might have diverted the shipment, the undisputed and acknowledged facts show that not only was this not done, but that the gasoline was purchased for the purpose of use in Louisiana, was at once carried there, and actually used as an instrumentality in carrying on a business recognized by this court as interstate commerce. See *Foster-Fountain v. Haydel*, 73 L. E. 147, 278 U. S. 1.

The distinction between the facts and the proposition before the Court in the case of *Louisville & Nashville R. R. Co. v. Parker*, 242 U. S. 13-14, cited by Your Honors, is that in the latter case, whether or not the car was to be used in interstate commerce was a disputed fact, the car in question was not moving in foreign commerce, but it was contended that it was intended for this purpose. However, the court recognized that even the intent would govern if properly placed before the jury, saying in part:

> "This car was not moving in interstate commerce, and that fact was treated as conclusive by the court of appeals. In this the court was in error, for if, as there was strong evidence to show, and as the court seemed to assume, this movement was simply for the purpose of reaching and moving an interstate car, the purpose would control and the business would be interstate."

As well as in the case of *Kalem Co. v. Harper Brothers*, 222 U. S. 55, cited by Your Honors, this court recognized

that while a merely incidental connection with a transaction would not impart guilty knowledge, one would be held for acts expecting a certain accomplishment, especially if the results were as expected, we call to the court's attention that no question of interstate commerce was before the court in the cited case.

Ignoring the bill of lading used by the appellant, we have here a case where are found the following essential elements of interstate commerce, viz:

First: Intent and a regular course of business in volume as large as the fishing industry of Mississippi. See R. pages 38-39.

Second: Transportation without a break in its continuity.

Third: The actual crossing of state boundaries of an article of commerce in large quantities and its use in such state to carry on water borne commerce.

The facts of the above are not disputed in the record, briefs or opinion of the Court, and we would most respectfully submit that they constitute interstate commerce, freed from even the duty to pay tribute to a state, and that the nature of such commerce is not changed by the method of transportation used. Therefore we say:

SECOND

That whether or not the gasoline was transported in the purchaser's vessels is not decisive of the nature of the commerce, but the possibility of diver-

sion of the goods always yields to the party's intent and the transportation actually accomplished.

We call to the Court's attention that the Court was greatly influenced by the fact that the transportation to Louisiana of the gasoline was upon the vessels of the purchaser, and that, therefore, there existed the possibility that the purchasers might have diverted this gasoline and its foreign destination changed; in fact, the Court intimated that had the gasoline by mutual agreement been put in the hands of a third person, a common carrier, for transportation, the mere posibility that the vendor might be able to induce the carrier to forego his rights might not have been enough to take the transaction out of interstate commerce, the Court citing the case of *Spalding Bros. v. Edwards,* 262 U. S. 66, a case very analogous to the case at bar, except that the transportation was by means of a common carrier and to a foreign country. And, also, citing the case of *Sonneborn Brothers v. Cureton,* 262 U. S. 506, in which case, we again respectfully call the Court's attention to the fact that although this case was cited very earnestly by the appellee in its original brief, no effort was ever made by Texas to collect for gasoline from sales to be delivered out of the state. The proposition as to whether or not interstate commerce is governed by a type of transportation; that is, whether transported by a person in his vehicle or upon his own person, or whether transported by a common carrier has many times been before this Court; and unless we are gravely in error, it has not influenced the Court in its decision as to what constituted interstate commerce when all other elements of interstate commerce were present prior to the decision of the case at bar.

We find that this question was ably considered by Chief Justice Taft in the case of *Hughes Brothers Timber Co. v. State of Minnesota*, 272 U. S. 469, 71 L. Ed. 359. This was an effort of the State of Minnesota, not only to impress a tax but an ad valorem tax on timber which had grown and had been marketed in the State of Minnesota, and was being moved out of Minnesota by means of the public rivers of Minnesota and the private transportation of the owner of the timber. *In that case the logs held to be non-taxable were delivered by the vendor to the vendee's boats in the State of Minnesota. The facts in that case can not be distinguished from the facts in this case.* The Court in the opinion used the following language:

> "This court distinguished the facts in this case from the facts in the main case discussed in *Coe v. Errol*, 116 U. S. 517, 59 L. Ed. 715, 6 Sup. Ct. Rep. 475, as they can be distinguished here. It is clear that the entrepot or depot for the interstate shipment of logs was in the Swamp river. The drive in the two rivers though under the direction of the Timber Company, was not gathering the logs for subsequent interstate shipment, it was the interstate movement itself. Both parties intended interstate shipment, they had bound themselves to it, the logs were segregated and were moving in the contemplated journey which neither could prevent if they carried out their agreement. The delays in the continuity of movement were only incidental to the journey and the necessary change in the mode of transportation by which the logs were carried from a place in one state to a place agreed upon in another.

"The conclusion in cases like this must be determined from the various circumstances. Mere intention by the owner ultimately to send the logs out of the state does not put them in interstate commerce, nor does preparatory gathering for that purpose at a depot. It must appear that the movement for another state has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another state. It is much more difficult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination as in the Champlain Company case. The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation, as in the Champlain Company case."

In the case of *Champlain Realty Company v. Brattleboro*, 260 U. S. 366, 67 L. Ed. 309, the court used the following language to explain that such transportation, even though by the owner, constituted interstate commerce, even though there were necessary breaks in the continuity of the transportation:

"The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation which is not discrimina-

tive unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one state to another, in the course of such an uninterrupted journey, it is clearly immune. The doubt arises when there are interruptions in the journey, and when the property, in its transportation, is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken. *State, Demold, Prosecutor, v. Engle*, 34 N. J. L. 425, 435; *State, Lehigh & W. Coal Co., Prosecutor, v. Carigan*, 39 N. J. L. 36. This was the case in *Kelly v. Rhoads*, 188 U. S. 1, 47 L. Ed. 359, 23 Sup. Ct. Rep. 25, in which sheep driven 500 miles from Utah to Nebraska, which traveled 9 miles a day, were held immune from taxation in Wyoming, where they stopped and grazed on their way."

In the case of *United States v. Hill*, 248 U. S. 420, 63 L. Ed. 337, in which it was held that the transportation of liquor upon the person of one being carried in interstate commerce is in itself interstate commerce, the Court used in part the following language:

"The Constitution confers upon Congress the power to regulate commerce among the states. From an early day such commerce has been held to include the transportation of persons and property no less than the purchase, sale and exchange of commodities. *Gibbons v. Ogden*, 9 Wheat, 1, 188, 6 L. Ed. 23, 68; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 29 L. Ed. 158, 161, 1 Inters. Commerce Rep. 382, 5 Sup. Ct. Rep. 826. 'Importation into one state from another is the in-

dispensable element—the test—of interstate commerce.' *International Textbook Co. v. Pigg*, 217 U. S. 91, 107, 54 L. Ed. 678, 685, 27 L. R. A. (N. S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; *The Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 345, 47 L. Ed. 492, 496, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561. The transportation of one's own goods from state to state is interstate commerce, and, as such, subject to the regulatory power of Congress. *Pipe Line Cases* (*United States v. Ohio Oil Co.*), 234 U. S. 548, 560, 58 L. Ed. 1459, 1470, 34 Sup. Ct. Rep. 956. The transportation of liquor upon the person of one being carried in interstate commerce is within the well-established meaning of the words, 'interstate commerce.' *United States v. Chavez*, 228 U. S. 525, 532, 57 L. Ed. 950, 952, 33 Sup. Ct. Rep. 595."

In the case of *Kirmeyer v. Kansas*, 236 U. S. 568, 59 L. Ed. 721, a case involving the right of Kansas to prevent the introduction of liquor into its borders, which had been a part of the public policy and express law of the state for many years, the court held that this law must bow to the introduction in interstate commerce of liquor into Kansas, even though the transportation was by the owner in a vehicle owned by him, Justice McReynolds using in part the following language in deciding this case:

"The foregoing cases and those cited therein we also regard as controlling authority in support of the claim that the business carried on by plaintiff in error within the State of Kansas was interstate commerce. That the traffic moved by horse-drawn wagons from a point near the state line, instead of by railroad from a greater dis-

> tance, does not change the applicable rule. Nor did the mere adoption of cumbersome and expensive methods render the business intrastate,—that must be tested by the actual transactions."

We also call to the attention of the court the whole philosophy expressed in what is a monumental case on the question of the right to tax goods intended for or actually in transportation in interstate commerce.

The case of *Goe v. Errol*, 116 U. S. 517, 29 L. Ed. 715. In this case, the Court most exhaustively went into the question of whether or not the property owned by Goe was taxable in New Hampshire; and, although it decided that such property was in fact taxable, the question of its transportation by the owner was not alluded to as a basis upon which to base such right of taxation. In fact, the Court, in leading up to its final conclusion, expressed the opinion that the manner of transportation would be of no importance, provided that such transportation actually took place, using the following language:

> "This question does not present the predicament of goods in course of transportation through a state, although detained for a time within the state by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another state, or delivered to a carrier for such transportation."

And in the *Pipe Line Cases, United States v. Ohio Oil Co.*, 234 U. S. 548, Your Honors held that the method of transportation, that is, whether or not by the owner, was not conclusive on the question as to whether or not such transportation constituted interstate commerce, but, on the contrary, if all the essential facts of transportation from one state to another were present, interstate commerce would arise regardless of whether or not the owner of the article was also engaged in the transportation of it.

In the case of *Kelly v. Rhoades*, 188 U. S. 1, 47 L. E. 359, ,the owner of a herd of ten thousand sheep drove them from Utah through the State of Wyoming on the way to Nebraska for the purpose of selling the sheep. They traveled about nine miles per day, grazing somewhat in their onward travels. The statutes of Wyoming levied a tax upon cattle grazing, and it will be observed that the tax was an occupation tax as is the one under discussion. The state court held that the owner was liable therefor. This Court held on appeal that the cattle were moving in interstate commerce, and not subject to state taxation. In that case, the owner was driving his own cattle through the State of Wyoming on the way to Nebraska. He might have diverted them and sold them in Wyoming if he felt disposed to do so, and it does not appear that the cattle were bound for any fixed destination in the State of Nebraska. They were being taken there for sale wherever purchasers might be found.

The case of *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265, 66 L. E. 227, is directly in point. In that case, oil

was assembled by a pipe line company for various producers. The large portion of it flowed out of the state, but the pipe line company had the authority to determine the destination of the oil. A portion of it was delivered in the State of Virginia. This court held that the commodity was moving in interstate commerce and not subject to state taxation, using the following language:

> "It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the beginning of the flow, and that it was none the less so that if different orders had been received by the pipe line it would have changed the destination upon which the oil was started and at which it in fact arrived. We repeat that the pipe line company, not the producer, was the master of the destination of any specific oil. Therefore, its intent and action determined the character of the movement from its beginning, and neither the intent nor the direction of the movement changed."

Intertsate commerce manifests itself in two ways; it enters the state or it moves out. It has been thoroughly settled that incoming commodities relinquish intertsate characteristics when such property comes to a rest in the state and forms part of the general mass of property in the state. See *Sonneborn Bros. v. Cureton*, supra.

In the present case, we have the converse, property moving out of the state. From the foregoing authorities, it is well settled that in such case, property moving from one state to another is in interstate commerce and free from state taxation when it starts on its intertsate journey. Such

test should be applied in this case, and not that of method of transportation. The vendor, appellant, contracted to maintain on hand sufficient gasoline to answer the requirements of the packers. When directed by a packer, the appellant put the gasoline into a sealed container, and as part of the contract of sale, started the gasoline on its intertsate journey by transporting the same from its station where its tanks were maintained to the packers' wharf, at which point, the packers, through a uniform course of businses, without interruption, transported the sealed container to the State of Louisiana, where they were sold to fishermen.

Your Honors, we respectfully submit, applied the erroneous test of method of transportation. The test which should be applied in the present case is not the method of transportation, but as to whether or not the appellant, as part of the contract of sale, started the gasoline on its interstate journey . In other words, the appellant contracted to do more than merely sell the gasoline in Mississippi; the appellant contracted and agreed to actually perform part of the interstate transportation, which was that of carrying the gasoline from its place of business to the packers' wharf. It is conceded in this case by the appellee that there was no diversion and that every particle of the gasoline started on the intertsate journey for the appellant was actually transported beyond the limits of the State of Mississippi, the volume of which business appears, R. 17-30.

We would, therefore, suggest to the Court that the liability vel non of the appellant for the tax in this case was to be determined wholly on the question of whether or not the gasoline was sold for the purpose of being carried into

another state, was by a continuous journey carried into another state and delivered in such other state, and not on the question as to whether or not it was carried by the purchaser in his own vessels with the necessary right of the purchaser to divert his own vessels. The whole record speaks without dispute in support of the fact that from the very beginning there was an intent to purchase gasoline for the purpose of such transportation; that immediately a delivery took place, followed by a journey on the public waters of the state to another state where the gasoline was used. The record further shows that there was an agreement to have this gasoline on hand for such commerce, and that it was an absolutely necessary factor in carrying on the commercial intercourse had with Louisiana in fishing for shrimp and oysters in Louisiana. In other words, it was used for the purpose of enabling the citizens of Mississippi to carry on a very important course of commerce with citizens of the State of Louisiana. The record discloses that there were no railroads or other common carriers touching in or about the point where it was necessary for the fishermen to be supplied with a means of creating power to be used in their boats. These boats were being used in interstate commerce as they carried on that type of intercourse between the State of Louisiana and the State of Mississippi. In the case of *Helson v. Commonwealth of Kentucky*, 279 U. S. 245, 73 L. Ed. 683, the gasoline used in propelling a vessel engaged in interstate commerce would be free from taxation regardless of anything except the fact that it was used in furtherance of such commerce. This proposition was sustained in the Helson case in the following language:

"And is not the fuel consumed in propelling

> the boat an instrumentality of commerce no less than the boat itself? A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce. If a tax can not be laid by a state upon the interstate transportation of the subjects of commerce, as this court definitely has held, it is little more than repetition to say that such a tax can not be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the states.' *Gloucester Ferry Co. v. Pennsylvania*, supra, page 214."

This argument is based wholly upon the thought that there was no question in the court's mind but that the gasoline was purchased in Mississippi for transportation to Louisiana and was so transported and used in Louisiana, as there is no intimation in the court's opinion of any contrary view. This being true, unless the court should depart from its finding in *Coe v. Errol, Hughes Bros. v. Minnesota, Champlain Realty Co. v. Brattleboro* and numerous other cases, the fact that the gasoline was in the hands of the purchaser to do with it as it liked would be meaningless provided the court was of the opinion that the power of such diversion did not influence the journey, and, in fact, no such diversion occurred; for, unless we are wholly wrong in our construction of the cases above referred to, the mere power of the owner to divert the shipment was not a controlling factor, but the facts and circumstances of the transportation alone control.

In the opinion of the Court, reference is also made to the case of *Lemke Milling Co. v. Farmers' Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, in explaining that circumstances, such as the universal movement of grain from a state to a market, would influence the legal conclusions otherwise surrounding certain facts, and while we must admit that in volume, value and amount the products of a great state like North Dakota vastly exceed the total of the value of the fishing business of Mississippi, yet, to the inhabitants of that small area, who are wholly sustained by their commerce in fishing, the importance of the industry is just as great, and certainly they would be entitled to a recognition of their commerce as being interstate in character, when all of the circumstances surrounding this commerce are much more perfect in detail than were the circumstances surrounding the commerce in the case referred to by Your Honors. For instance, in the Lemke case, the grain was raised in Dakota and the title passed to the elevator in Dakota, and while a vast amount of the grain reached its ultimate market in Minnesota, still, some of it was diverted for milling purposes in the state of its purchase. In other words, in the cited case, a partial diversion actually took place; yet, Your Honors recognizing the necessity for the protection of commerce from any attacks, gave to all of the grain the status of interstate commerce so that adequate protection could be afforded that great major portion which went out into the commercial channels of the various states of the Union. However, in the case before the Court, there is not even a suggestion of the diversion of one gallon of this gasoline. It was kept on hand in Biloxi so that the wants of the persons engaged in commerce in Louisiana could be supplied. It was purchased for this purpose, and, without a break in

the continuity of transportation, was transported for this purpose and finally used for this purpose.

Here we will ask the Court to consider with us the great import to this country of commerce in fishing for sea foods, &c.; that day by day, the government itself is recognizing, not only the tremendous value of this vast reservoir of food to the people of this country, but is endeavoring to perpetuate this value and to increase the supply, so that when other resources are exhausted and depleted as in so many older countries, we will have the sea to turn back to. Certainly, when commerce of such an article is carried on with so many states, it would rise to equal dignity with any other article of value and use to the citizens of the various states. If we give it this dignity, then, the power of diversion of this gasoline, even though exercised by the owner, would not prevent it from being protected by the Commerce Clause under the holding of the Court and the theory advanced by Justice McReynolds in the case of *Helson v. Kentucky*, supra.

We agree with the Court that the life blood of a state is its taxes and that this precious value should be given every protection that can be afforded it by the laws of this land. However, the states would be nerveless without the great open channels of commerce which under the guidance of our great Chief Justice Marshall were made free for all the citizens of our land, whether operating steam boats, railroads, ox teams or flat boats, and we believe that the right of this freedom rises paramount even to the right of taxation, and if this be true, this right belongs equally to those who in their own boats go down into the sea to bring

back to the balance of the country the wealth of their catches as well as it does to other more fortunately situated persons, who are able to carry on their commerce through the great channels of the common carriers of this country.

We therefore say to the Court that unless the Court shall adopt the theory that the Commerce Clause is meaningless except as to articles transported from state to state by means of a common carrier, a rehearing in this cause should be granted, so that if possible the Court might reconsider its decision that the private ownership of a means of transportation will not govern the construction to be placed on whether or not such transportation is in interstate commerce in cases where there is a sale for interstate commerce in continuous transportation from one state to another and delivery into the channels of commerce of such other state.

Wherefore, upon the foregoing grounds, this appellant and petitioner respectfully prays this Honorable Court to grant it a rehearing of said cause.

WM. H. WATKINS,
W. LEE GUICE,
Attorneys for Appellant.

I, William H. Watkins, of counsel for the appellant herein, certify that the foregoing petition for rehearing is presented in good faith, and not for delay .

This, the 22nd day of March, 1930.

WILLIAM H. WATKINS,
Of Counsel for Appellant.